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6 Attorney for the Department of Securities

7 **BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE**
8 **OFFICE OF THE STATE AUDITOR**
9 **STATE OF MONTANA**

10 In the matter of)
11) CASE NO. SEC-2009-78
12 MERRILL LYNCH, PIERCE, FENNER)
13 & SMITH INCORPORATED,)
14) **CONSENT AGREEMENT AND**
15 Respondent.) **FINAL ORDER**
16)
17)

18 CONSENT AGREEMENT dated this 14th day of December, 2009,
19 between the Montana Securities Department ("Department"), acting pursuant to the authority of the
20 Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.* and Mont. Code Ann. § 2-4-603,
21 and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch").

22 WHEREAS, Merrill Lynch is a broker-dealer registered in the state of Montana, with a
23 Central Registration Depository ("CRD") number of 7691; and

24 State securities regulators from multiple jurisdictions have conducted coordinated
25 investigations into the registration of Merrill Lynch Client Associates ("CAs") and Merrill Lynch's
26 supervisory system with respect to the registration of CAs; and

Merrill Lynch has cooperated with regulators conducting the investigations by responding
to inquiries, providing documentary evidence and other materials, and providing regulators with
access to facts relating to the investigations; and

1 Merrill Lynch has advised regulators of its agreement to resolve the investigations pursuant
2 to the terms specified in this Consent Agreement and Final Order (the "Order"); and

3 Merrill Lynch agrees to make certain changes in its supervisory system with respect to the
4 registration of CAs, and to make certain payments in accordance with the terms of this Order; and

5 Merrill Lynch elects to waive permanently any right to a hearing and appeal under Mont.
6 Code Ann. § 30-10-308, with respect to this Order; and

7 Solely for the purpose of terminating the multi-state investigations, and in settlement of the
8 issues contained in this Order, Merrill Lynch, without admitting or denying the findings of fact or
9 conclusions of law contained in this Order, consents to the entry of this Order.

10 NOW, THEREFORE, the Commissioner of Securities, as administrator of the Securities
11 Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.*, hereby enters this Order:

12 **I.**

13 **FINDINGS OF FACTS**

14 1. Merrill Lynch admits the jurisdiction of the Department in this matter.

15 Background on Client Associates

16 2. The CAs function as sales assistants and typically provide administrative and sales
17 support to one or more of Merrill Lynch's Financial Advisors ("FAs"). There are different titles
18 within the CA position, including Registered Client Associate and Registered Senior Client
19 Associate.

20 3. The responsibilities of a CA specifically include:

- 21 a. Handling client requests;
- 22 b. Resolving client inquiries and complaints;
- 23 c. Determining if client issues require escalation to the FA or the branch management
- 24 team; and

1 d. Processing of operational documents such as letters of authorization and client
2 check requests.

3 4. In addition to the responsibilities described above, and of particular significance to this
4 Order, some CAs are permitted to accept unsolicited orders from clients. As discussed below,
5 Merrill Lynch's written policies and procedures require that any CAs accepting client orders first
6 obtain the necessary licenses and registrations.

7 5. Notably, FAs might have a "primary CA" and a "secondary CA". As suggested by the
8 designation, the customary practice is that the primary CA would handle the FA's administrative
9 matters and client orders. However, if the primary CA was unavailable, the secondary CA would
10 handle the FA's administrative matters and client orders.

11 6. During the period from 2002 to the present, Merrill Lynch employed approximately
12 6,200 CAs (average) per year.

13 Registration Required

14 7. Pursuant to Mont. Code Ann. § 30-10-201(1), a broker-dealer or salesperson must be
15 registered pursuant to the Securities Act of Montana in order to engage in the sale of securities in
16 Montana.

17 8. In addition to the general prohibition under Mont. Code Ann. § 30-10-201(1), a person
18 cannot accept unsolicited orders in Montana without being registered according to Mont. Code
19 Ann. § 30-10-201(1).

20 9. Pursuant to Mont. Code Ann. § 30-10-305(3), a broker-dealer may be fined for selling
21 securities in Montana through agents other than registered agents.

22 Merrill Lynch Requires Registration of Client Associates

23 10. In order for a CA to accept client orders, Merrill Lynch generally required each CA to
24 pass the series 7 and 63 qualification exams and to register in the appropriate jurisdictions.

1 11. At all times relevant to this Order, Merrill Lynch's policies and procedures specified
2 that each CA maintain registrations in the same jurisdictions as his or her FA, or broadly required
3 that each CA maintain registrations in all necessary jurisdictions.

4 Regulatory Investigations and Findings

5 12. In May 2008, state regulators received a tip alleging that Merrill Lynch was failing to
6 ensure its CAs were in compliance with jurisdictional registration requirements and its own
7 procedures. The tip alleged that Merrill Lynch CAs were registered in two jurisdictions – the CA's
8 home state and one neighboring state – because Merrill Lynch only paid for registrations in two
9 jurisdictions.

10 13. During the summer of 2008, Merrill Lynch received inquiries regarding CA
11 registrations from a number of state securities regulators.

12 14. Because Merrill Lynch's relevant trade records were maintained in hard copy and only
13 at branch offices across the country, the multi-state investigation focused on systemic issues with
14 Merrill Lynch CA registrations and related supervisory structure instead of attempting to identify
15 each incidence of unregistered activity. Specifically:

- 16 a. After accepting a client order, CAs accessed the electronic trading system to enter
17 the order;
- 18 b. The CAs did not have to identify themselves during the order entry process.
19 Therefore, there is no electronic record that identifies which orders were accepted
20 by CAs;
- 21 c. Instead, Merrill Lynch maintained a daily report that recorded the identity of the
22 person who accepted and/or entered each order. However, this report was not
23 maintained electronically, and was only maintained at the branch office where the
24

1 order was entered. Merrill Lynch represented that this daily report was the only
2 record that could identify who accepted a client order.

3 d. Merrill Lynch's trading system checked the registration of the FA, but did not check
4 the registration status of the person accepting the order to ensure that the person was
5 registered in the appropriate jurisdiction.

6 15. The multi-state investigation found that many CAs supported FAs registered in
7 Montana when the CAs were not registered in Montana as agents of Merrill Lynch. This
8 difference in registration status increased the possibility that CAs would engage in unregistered
9 activity.

10 16. The multi-state investigation found that certain Merrill Lynch CAs engaged in the sale
11 of securities in Montana at times when the CAs were not appropriately registered in Montana.

12 Merrill Lynch's Remedial Measures and Cooperation

13 17. As a result of the inquiries by state regulators, Merrill Lynch conducted a review of its
14 CA registration practices.

15 18. Merrill Lynch's review found that as of June 30, 2008, the firm had 3,780 registered
16 CAs. Approximately 2,200, almost 60%, of those registered CAs were only registered in their
17 home state or their home state and one additional state.

18 19. Consistent with the fact that many Merrill Lynch CAs were only registered in one or
19 two jurisdictions, Merrill Lynch's review found incidences of trading by CAs not properly state
20 registered.

21 20. In October 2008, Merrill Lynch amended its registration policy to require that each CA
22 mirror the state registrations for the FAs that they support.¹ Merrill Lynch's Registration
23

24 ¹ It should be noted that Merrill Lynch's policy required CA/FA registration mirroring prior to 2006. In 2006,
it amended the relevant policies and procedures to more broadly require that CAs maintain appropriate registrations.

1 Compliance personnel participated in calls with branch management to advise the field about this
2 requirement.

3 21. As Merrill Lynch worked on a more permanent solution, it also developed a temporary
4 report intended to identify instances where a CA's registration did not match the FA or FAs the CA
5 supported.

6 22. Between October 1, 2008, and January 28, 2009, two hundred twenty-two CAs
7 registered with the Department as agents of Merrill Lynch. Yet data as of February 28, 2009,
8 indicated that significant gaps remained between the registrations of CAs and their FAs.

9 23. However, Merrill Lynch, as a compliance enhancement, also developed an electronic
10 system that will prevent a person from entering client orders from a state in which the person
11 accepting the order is not registered. Merrill Lynch has represented to the Staff that the firm began
12 implementing this new system in June 2009 and expects it to be fully implemented by December
13 31, 2009.

14 24. Merrill Lynch provided timely responses and substantial cooperation in connection with
15 the regulatory investigations into this issue. Furthermore, as displayed by the corrective actions
16 described above, Merrill Lynch has acknowledged the problems associated with its CA
17 registrations and supervisory system.

18 II.

19 CONCLUSIONS OF LAW

20 1. The State Auditor is the Commissioner of Securities (Commissioner) pursuant to
21 Mont. Code Ann. § 30-10-107.

22 2. The Administration of the Securities Act of Montana, Mont. Code Ann., Title 30,
23 Chapter 10, Parts 1-3 is under the supervision and control of the Commissioner pursuant to Mont.
24

1 Code Ann. § 30-10-107.

2 3. The Securities Act of Montana shall be construed to protect investors, persons
3 engaged in securities transactions, and the public interest according to Mont. Code Ann. § 30-10-
4 107.

5 4. The Commissioner and the Department have jurisdiction over this matter pursuant
6 to Mont. Code Ann. § 30-10-107.

7 5. Merrill Lynch's failure to establish an adequate system to monitor the registration
8 status of persons accepting client orders constitutes a violation of Mont. Code Ann. § 30-10-
9 201(13)(k).

10 6. Merrill Lynch's failure to require its CAs to be registered in the appropriate
11 jurisdictions constitutes a failure to enforce its established written procedures, and is a basis for the
12 issuance of an Order assessing a fine against Merrill Lynch pursuant to Mont. Code Ann § 30-10-
13 305(3).

14 7. Pursuant to Mont. Code Ann. § 30-10-201, Merrill Lynch's sales of securities in
15 Montana through unregistered CAs constitute bases for the issuance of an Order assessing a fine
16 against Merrill Lynch.

17 8. Pursuant to Mont. Code Ann. § 30-10-305(1)(a), Merrill Lynch's sales of securities
18 in Montana through agents/sales representatives not registered in Montana constitute bases to order
19 Merrill Lynch to cease and desist engaging in the sale of securities in Montana through
20 unregistered broker-dealers or salespersons.

21 9. Pursuant to Mont. Code Ann. § 30-10-305(3), the violations described above
22 constitute bases for the assessment of an administrative fine against Merrill Lynch.

23 10. The Commissioner finds the following relief appropriate and in the public interest.
24

1 not a party to the Order, this Order does not limit or create any private rights or remedies against
2 Merrill Lynch, including limit or create liability of Merrill Lynch, or limit or create defenses of
3 Merrill Lynch, to any claims.

4 3. Merrill Lynch is hereby reprimanded.

5 4. Merrill Lynch is hereby ordered to cease and desist from engaging in the sale of
6 securities in the state of Montana through persons not registered with the Commissioner as agents of
7 Merrill Lynch.

8 5. Merrill Lynch is hereby ordered to a fine of Three Hundred Thousand Dollars
9 (\$300,000.00) to the State of Montana, and Forty Thousand One Hundred Dollars (\$40,100.00) to
10 the Investor Protection Trust for investor education on behalf of the state of Montana within ten
11 days of the date of this Order. The payment to the State of Montana shall be sent to the State
12 Auditor's Office, attention to Michael Winsor, 840 Helena Avenue, Helena, Montana 59601 (to be
13 deposited into the general fund. The payment to the Investor Protection Trust shall reference the
14 Montana settlement and be sent to IPT, attention to Don Blandin, Suite 300, 919 Eighteenth Street
15 NW, Washington DC 20006-5517 (for investor education).

16 6. Merrill Lynch shall pay up to a total of Twenty-Six Million, Five Hundred Sixty-Three
17 Thousand, Ninety-Four Dollars and Fifty Cents (\$26,563,094.50) in fines, penalties and any other
18 monetary sanctions among the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin
19 Islands pursuant to the calculations discussed with the multi-state working group.

20 7. However, if any state securities regulator determines not to accept Merrill Lynch's
21 settlement offer, the total amount of the payments to the State of Montana and the Investor
22 Protection Trust on behalf of Montana shall not be affected, and shall remain at a total of Three
23 Hundred Thousand Dollars (\$300,000.00) for the State of Montana and Forty Thousand One
24 Hundred Dollars (\$40,100.00) for the Investor Protection Trust on behalf of Montana.

1 8. Merrill Lynch is hereby ordered to comply with the Undertakings contained herein.

2 9. This order is not intended by the Department to subject any Covered Person to any
3 disqualifications under the laws of the United States, any state, the District of Columbia, Puerto
4 Rico, or the U.S. Virgin Islands including, without limitation, any disqualification from relying
5 upon the state or federal registration exemptions or safe harbor provisions. "Covered Person,"
6 means Merrill Lynch or any of its affiliates and their current or former officers or former officers,
7 directors, employees, or other persons that would otherwise be disqualified as a result of the Orders
8 (as defined below).

9 10. This Order and the order of any other state in related proceedings against Merrill
10 Lynch (collectively, the "Orders") shall not disqualify any Covered Person from any business that
11 they otherwise are qualified, licensed or permitted to perform under applicable securities laws of
12 Montana and any disqualifications from relying upon this state's registration exemptions or safe
13 harbor provisions that arise from the Orders are hereby waived.

14 11. This Order shall be binding upon Merrill Lynch and its successors and assigns as
15 well as to successors and assigns of relevant affiliates with respect to all conduct subject to the
16 provisions above and all future obligations, responsibilities, undertakings, commitments,
17 limitations, restrictions, events, and conditions.

18 DATED this 14th day of December, 2009.

19
20 BY ORDER OF MONICA J. LINDEEN
21 Commissioner of Securities and Insurance

22 By: 
23 _____
24 LYNNE EGAN

 Deputy Securities Commissioner

1 **CONSENT TO ENTRY OF CONSENT AGREEMENT AND FINAL ORDER BY**
2 **MERRILL LYNCH**

3 Merrill Lynch hereby acknowledges that it has been served with a copy of this Consent
4 Agreement and Final Order ("Order"), has read the foregoing Order, is aware of its right to a hearing
5 and appeal in this matter, and has waived the same.

6 Merrill Lynch admits the jurisdiction of the Department, neither admits nor denies the
7 Findings of Facts and Conclusions of Law contained in this Order, and consents to entry of this Order
8 by the Department as settlement of the issues contained in this Order.

9 Merrill Lynch agrees that it shall not claim, assert, or apply for a tax deduction or tax credit
10 with regard to any state, federal or local tax for any administrative monetary penalty that Merrill
11 Lynch shall pay pursuant to this Order.

12 Merrill Lynch states that no promise of any kind or nature whatsoever was made to it to induce
13 it to enter into this Order and that it has entered into this Order voluntarily.

14 Teresa M. Brenner represents that she is Associate General Counsel of Merrill Lynch and that,
15 as such, has been authorized to enter into this Order for and on behalf of Merrill Lynch.

16 Dated this 9th day of December, 2009.

17 MERRILL LYNCH, PIERCE, FENNER & SMITH
18 INCORPORATED

19 By: Teresa M. Brenner
20 Title: Associate General Counsel

21 STATE OF NORTH CAROLINA
22 COUNTY OF MECKLENBURG

23 I certify that Teresa M. Brenner personally known to me, appeared before me this day and
24 acknowledged the due execution of the foregoing instrument.

 Witness my hand and official seal, this the 9th day of December, 2009.

(Official Seal)



James E. Dwiggins
James E. Dwiggins, Notary Public
My Commission Expires: May 2nd, 2010.